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21 IN THE UNITED STATES DISTRICT COURT  
22  
23 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
24  
25 SAN FRANCISCO DIVISION

26 MICHAEL LYNN WATERS,

27 Plaintiff,

28 v.

29 A.W. COOK, et al,

30 Defendants.

31 C 07-4683 CRB (PR)

32 DEFENDANTS' NOTICE OF  
33 MOTION AND MOTION TO  
34 DISMISS; MEMORANDUM  
35 OF POINTS AND  
36 AUTHORITIES

37 TO PLAINTIFF MICHAEL LYNN WATERS, IN PRO SE:

38 PLEASE TAKE NOTICE THAT Defendants C. Wilber, F. Jacquez, R. Horel, J. Robertson,  
39 D. Melton, M. Cook, C. Patten, R. Bell, and R. Linfor (Defendants) move the Court to dismiss  
40 this 42 U.S.C. § 1983 action under Federal Rule of Civil Procedure 12(b) for Plaintiff's failure to  
41 exhaust administrative remedies as mandated by the Prison Litigation Reform Act (PLRA), 42  
42 U.S.C. § 1997e(a) (2000).

43 PLEASE TAKE FURTHER NOTICE that the Court may look beyond the pleadings and  
44 decide disputed issues of fact when ruling on Defendants' non-enumerated Rule 12(b) motion.

1      *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003). Plaintiff may provide evidence to the  
 2 Court to dispute Defendants' evidence. *Id.* & n.14.

3      This motion is based on this notice of motion, the supporting memorandum of points and  
 4 authorities, the declaration and exhibits filed in support, and the Court's file in this action.

5

6                    **MEMORANDUM OF POINTS AND AUTHORITIES**

7                    **INTRODUCTION**

8      Defendants move to dismiss this action because Plaintiff has not complied with the  
 9 provision of the Prison Litigation Reform Act (PLRA) requiring exhaustion of administrative  
 10 remedies before filing suit. Plaintiff failed to properly exhaust administrative remedies for the  
 11 claim of deliberate indifference to safety in his complaint. Between the date that Plaintiff  
 12 contends he was granted single-cell status and the date that he filed the complaint in this suit,  
 13 Plaintiff did not submit an inmate appeal to the Director's Level of Review addressing the  
 14 allegations of misconduct set forth in his complaint. Because exhaustion is a prerequisite to all  
 15 federal suits brought by a prisoner, this action should be dismissed.

16                    **STATEMENT OF THE ISSUE**

17      The Supreme Court has held that, under the PLRA, an inmate must properly exhaust all  
 18 available administrative remedies before filing suit. Plaintiff failed to submit an inmate appeal  
 19 through the Director's Level of Review concerning his allegation in this case. Are Defendants  
 20 entitled to dismissal of the action against them because Plaintiff failed to exhaust his  
 21 administrative remedies?

22                    **PROCEDURAL BACKGROUND**

23      Plaintiff, an inmate within the California Department of Corrections and Rehabilitation  
 24 (CDCR) at Pelican Bay State Prison (PBSP), filed a complaint on September 11, 2007 under 42  
 25 U.S.C. § 1983 seeking injunctive relief. (Compl. 7.) This Court found that Plaintiff stated a  
 26 cognizable claim of deliberate indifference to safety needs. (Order Serv. 1, Aug. 11, 2006.) The  
 27  
 28

1 Court then directed the United States Marshals Service to serve all named Defendants.<sup>1/</sup> (*Id.* 3.)

### STATEMENT OF FACTS

#### A. The California Inmate Appeals Process.

4 The State of California provides its inmates with an administrative-appeals process, which  
 5 addresses “any departmental decision, action, condition or policy which they can demonstrate as  
 6 having an adverse effect upon their welfare.” Cal. Code Regs. tit. 15, § 3084.1(a) (2007). To  
 7 initiate the appeals process, an inmate need only fill out a simple form, a CDCR 602  
 8 Inmate/Parolee Appeal Form. *Id.* § 3084.2(a). To exhaust available administrative remedies  
 9 within this system, a prisoner must complete four levels of appeals: (1) the informal level of  
 10 review, (2) the first formal level of review, (3) the second formal level of review by the  
 11 institution head or designee, and (4) the third formal level of review, the Director’s Level. *See*  
 12 *id.*; *see also* *Woodford v. Ngo*, 126 S. Ct. 2378, 2383 (2006) (describing the California inmate-  
 13 appeals system step-by-step). Once a Director’s Level decision issues, exhaustion of all available  
 14 administrative remedies has been completed. *See* Cal. Code Regs. tit. 15, §§ 3084.5, 3084.1(a).

#### B. Plaintiff’s Complaint.

16 This Court summarized Plaintiff’s claims in his complaint as follows: “Plaintiff alleges that  
 17 he is at risk of being attacked by another prisoner due to his being a former gang member  
 18 because prison officials stopped honoring his single-cell status and placed him in the behavioral  
 19 management unit (BMU). Plaintiff claims he was recently almost “jump[ed]” by “two blood  
 20 gang members” in the BMU.” (Order Serv. 1:19-23.)

21 Specifically, Plaintiff contends that he received a single-cell status on March 6, 2006 due to  
 22 his obsessive compulsive disorder issues. (Compl. 4:12-14.) According to Plaintiff, Defendants  
 23 did not believe Plaintiff had received a single-cell status and felt that he refused to double cell  
 24 with another inmate. (*Id.* 4:20-24.) Plaintiff alleges that Defendants wrongly placed him in  
 25 BMU for refusing to cell with another inmate. (*Id.*, 5; Compl. Ex. A.) Plaintiff also alleges that

27 1. The California Attorney General’s Office represents all defendants except Kunz. To the  
 28 best of the Office’s knowledge, the summons issued to Kunz was returned unexecuted to the United  
 States Marshals Service.

1 Defendants' refusal to single-cell Plaintiff exposes him to harm since he provided confidential  
 2 information about witnessing two blood gang members who were going to jump Plaintiff and  
 3 another inmate. (Compl. 5.)

4 **C. Plaintiff's Administrative Grievances.**

5 Plaintiff has not exhausted an administrative grievance concerning the circumstances  
 6 described in his complaint, specifically, the alleged risk of attack by other inmates due to his  
 7 status as a former gang member because Defendants failed to honor Plaintiff's single-cell status  
 8 and placed him in the BMU. (Compl. 4-5; Order Serv. 1:17-22.) The Director's Level of  
 9 Review received six administrative grievances from Plaintiff after March 6, 2006, the date that  
 10 Plaintiff alleges that an Institution Classification Committee granted his single-cell status.  
 11 (Grannis Decl. Supp. Mot. Dismiss (Grannis Decl.) ¶¶ 4, 5 & Ex. A; Compl. 4:14-16.) The  
 12 events at issue in Plaintiff's complaint would have taken place after March 6, 2006 because  
 13 Defendants' alleged misconduct includes the subsequent denial of Plaintiff's single-cell status.  
 14 (Compl. 4.)

15 The only administrative grievance that was exhausted after March 6, 2006 and before filing  
 16 this action on September 11, 2007 involved a medical issue. (Grannis Decl. ¶¶ 5, 6, 7 & Ex. B.)  
 17 Inmate appeal number 07-00872 was received at the Director's Level on May 31, 2007. (Grannis  
 18 Decl. ¶ 6; Grannis Decl. Ex. B.) In it, Plaintiff requested that he receive a magnetic resonance  
 19 imaging (MRI) because of an alleged brain injury and subsequent coma that he suffered at age  
 20 eight or nine. (*Id.*) But appeal number 07-00872 did not include allegations concerning  
 21 deliberate indifference to safety. (*Id.*) Nor did this appeal describe Defendants' failure to  
 22 recognize Plaintiff's single-cell status. (*Id.*) Plaintiff's other five appeals received at the  
 23 Director's Level were screened out for failure to complete the second level of review. (Grannis  
 24 Decl. ¶ 7.)

25 Plaintiff does reference an administrative grievance in his complaint, inmate appeal number  
 26 06-00110. (Compl. 3:1-4; Compl. Ex. K.) In it, Plaintiff requested single-cell status and that this  
 27 status be based on his mental health issues. (Compl. Ex. K.) This appeal was submitted on  
 28 November 6, 2005, and was granted at the second level of review. (*Id.*)

## **ARGUMENT**

**THIS ACTION MUST BE DISMISSED BECAUSE PLAINTIFF  
FAILED TO TIMELY EXHAUST HIS ADMINISTRATIVE  
REMEDIES.**

#### A. Under the Prison Litigation Reform Act, Exhaustion is Mandatory.

5 Plaintiff's claims against Defendants must be dismissed because he failed to exhaust  
6 administrative remedies as required by 42 U.S.C. § 1997e(a). In the Prison Litigation Reform  
7 Act, Congress amended 42 U.S.C. § 1997e(a) and imposed a mandatory exhaustion requirement  
8 on suits brought by inmates. *See Porter v. Nussle*, 534 U.S. 516, 524 (2002). The amended 42  
9 U.S.C. § 1997e(a) provides that “[n]o action shall be brought with respect to prison conditions  
10 under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail,  
11 prison or other correctional facility until such administrative remedies as are available are  
12 exhausted.” *See* 42 U.S.C. § 1997e(a).

13 Proper exhaustion of a prisoner's administrative remedies is necessary. *Woodford v. Ngo*,  
14 126 S. Ct. 2378, 2382 (2006). The exhaustion requirement is a prerequisite to all federal suits  
15 “[e]ven when the prisoner seeks relief not available in grievance proceedings, notably money  
16 damages.” *Porter*, 534 U.S. at 524; *see also Booth v. Churner*, 532 U.S. 731, 738 (2001). It  
17 applies to “all suits about prison life, whether they involve general circumstances or particular  
18 episodes, and whether they allege excessive force or some other wrong.” *Porter*, 524 U.S. at  
19 532. Inmates exhaust their “available” administrative remedies before filing civil rights actions  
20 in federal courts. 42 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516, 524 (2002); *McKinney v.*  
21 *Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). Therefore, a prisoner must pursue the prison  
22 administrative grievance process before filing a complaint in federal court. *Vaden v. Summerhill*,  
23 449 F.3d 1047, 1050-1051 (9th Cir. 2006.)

24 The purposes of the exhaustion requirement are to “afford corrections officials time and  
25 opportunity to address complaints internally before allowing the initiation of a federal case,” to  
26 “filter out some frivolous claims,” and to possibly “satisfy the inmate, thereby obviating the need  
27 for litigation.” *Porter*, 534 U.S. at 525; see also *Booth*, 532 U.S. at 737 (stating that “requiring  
28 [administrative] exhaustion . . . would satisfy some inmates who start out asking for nothing but

1 money, since the very fact of being heard and prompting administrative change can mollify  
 2 passions"). Finally, for suits that do end up in federal court, exhaustion tends to improve their  
 3 quality by creating an administrative record that is helpful to the court in determining the  
 4 contours of the controversy. *Woodford*, 126 S. Ct. at 2387; *see also Booth*, 534 U.S. at 525.

5 The Ninth Circuit recognizes a defendant's right to raise the issue of exhaustion of  
 6 administrative remedies in a "nonenumerated" Rule 12(b) motion to dismiss. *Wyatt v. Terhune*,  
 7 315 F.3d 1108, 1119–20 (9th Cir. 2003); *Ritza v. Int'l Longshoremen's & Warehousemen's*  
 8 *Union*, 837 F.2d 365, 368–69 (9th Cir. 1988). A defendant can support the motion with evidence  
 9 and affidavits extrinsic to the complaint because, "[i]n deciding a motion to dismiss for a failure  
 10 to exhaust nonjudicial remedies, the court may look beyond the pleadings and decide disputed  
 11 issues of fact." *Wyatt*, 315 F.3d at 1119–20. The proper remedy for failure to exhaust  
 12 administrative remedies is dismissal without prejudice. *Id.* at 1120; *McKinney v. Carey*, 311  
 13 F.3d 1198, 1199–1201 (9th Cir. 2002).

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15 **B. Plaintiff Exhausted No Administrative Grievance Concerning Deliberate  
 Indifference to His Safety.**

16 Plaintiff alleges that he was single-celled in March 2006 and that thereafter Defendants  
 17 refused to recognize his single-cell status, but Plaintiff has not exhausted any administrative  
 18 grievance concerning deliberate indifference to safety as a result of Defendants' failure to  
 19 recognize his single-cell status. (Compl. 4; Grannis Decl. Ex. A.) In order to have satisfied the  
 20 exhaustion requirement in connection with his deliberate indifference to safety claim, Plaintiff  
 21 must have (1) submitted an appeal alleging deliberate indifference to safety on or after May 6,  
 22 2006, the date he claims the prison granted his single-cell status; and (2) exhausted the appeal  
 23 through the final Director's Level of review before September 11, 2007 (the date Plaintiff filed  
 24 suit in this Court). A review of the record shows that Plaintiff did not exhaust any deliberate  
 25 indifference claim before he filed suit. (Grannis Decl. Ex. A.)

26 Plaintiff avoided the PLRA's exhaustion requirement in its entirety by failing to file and  
 27 pursue an inmate appeal regarding the allegations in this suit through the Director's Level of  
 28 review. *See Cal. Code Regs. tit. 15 § 3084.2(a)*. During the time period at issue, Plaintiff

1 submitted six appeals at PBSP which were accepted at the Director's Level. (Grannis Decl. ¶ 5.)  
2 Plaintiff exhausted one appeal related to a medical issue. (*Id.*) This administrative grievance,  
3 inmate appeal number 07-00872 requested an MRI. (Grannis Decl. Ex. B.) Inmate appeal  
4 number 07-00872 did not address Defendants' failure to recognize Plaintiff's single-cell status.  
5 (*Id.*) The other five inmate appeals received at the Director's Level were screened out because  
6 Plaintiff failed to complete the second level of review. (*Id.*)

7 Plaintiff attached inmate appeal number 06-00110 to his complaint. (Compl. Ex. K.) This  
8 appeal is a request for single-cell status and does not grieve any facts related to the deliberate  
9 indifference claims in this suit. (Compl. Ex. K.) In fact, Plaintiff submitted this appeal on  
10 November 6, 2006, five months prior to the prison's alleged grant of single-cell status. (*Id.*)

11 The other five appeals submitted at the Director's Level of Review between March 6, 2006  
12 and September 11, 2006 were screened out for failure to complete the second level of review.  
13 (Grannis Decl. ¶ 7.)

14 Plaintiff must properly exhaust an administrative grievance concerning his allegation of  
15 deliberate indifference to safety before he can raise this claim against Defendants. *See* 42 U.S.C.  
16 § 1997e(a); *Woodford*, 126 S. Ct at 2382.

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## **CONCLUSION**

Plaintiff has not satisfied the PLRA's exhaustion requirement in connection with the allegations set forth in his complaint in this suit. Between March 6, 2006 and September 11, 2007, Plaintiff failed to submit and pursue an inmate appeal alleging deliberate indifference to safety through the Director's Level. Because Plaintiff is not in compliance with the PLRA, this action should be dismissed.

Dated: May 9, 2008

Respectfully submitted,

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Defs.' Not. Mot. & Mot. Dismiss; Mem. P. & A.

*Waters v. Cook, et al.,*  
C 07-4683 CRB (PR)